United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1183

To be argued by
MARGERY EVANS REIFLER

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JAMES HORELICK,

Petitioner-Appellee,

against

THE CRIMINAL COURT OF THE CITY OF NEW YORK; DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; FRANK S. HOGAN, District Attorney, New York County; and BENJAMIN MALCOLM, New York City Commissioner of Correction,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLANTS

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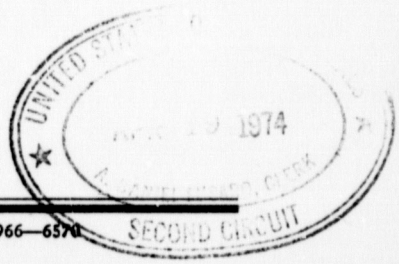

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BRIEF FOR RESPONDENTS-APPELLANTS

Questions Presented

1. In a habeas corpus proceeding, was it proper for the District Court to conduct a *de novo* review of the trial evidence to test the sufficiency of the evidence underlying the state convictions?

2. In conducting such a review, did the District Court correctly conclude that the evidence was insufficient?

3. Did the District Court's additional ground for reversing the October 17 trespass conviction result from an incorrect reading of the New York Court of Appeals opinion?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (LASKER, J.), dated November 26, 1973, which granted petitioner's application for a writ of habeas corpus to the extent of vacating his convictions for criminal trespass and granting the writ in full unless the State resentenced petitioner on his resisting arrest conviction within thirty days. On December 4, 1973 the District Court granted respondents' motion for a stay of its order pending appeal to this Court.

Facts

Petitioner, James Horelick, was convicted of two counts of criminal trespass and one count of resisting arrest in the Criminal Court of the City of New York, County of New York (SUGLIA, J.). On June 18, 1970 he was sentenced to pay a fine of $250 or serve thirty days in jail on the first trespass count and the resisting arrest count and to pay a fine of $250 or serve thirty days for the second trespass count. Petitioner was ordered to surrender on February 28, 1973 but the surrender was stayed by the District Court on February 27, 1973.

Pre Trial Proceedings

Petitioner and his co-defendant at trial, one Sandra Adickes, were arrested during incidents which occurred during the 1968 strike of teachers in the New York City School System. On October 17, 1968 petitioner was arrested at Washington Irving High School, in Manhattan, for criminal trespass (N.Y. Penal Law § 140.10) and resisting arrest (N.Y. Penal Law § 205.30). Ms. Adickes was arrested on the same date for interfering with the

arrest of petitioner.* On October 20, 1968 petitioner was again arrested for trespass at the same school.

On the date set for trial, following an unsuccessful attempt to have the District Court enjoin the state criminal trial, petitioner and his co-defendant sought to have their prosecution removed to the federal court, pursuant to 28 U.S.C. § 1443. An opposing motion to remand, made pursuant to 28 U.S.C. § 1447(c), was granted by the District Court (RYAN, J.) on October 7, 1969. This Court denied the motion for a stay, as did Justice Harlan and the full bench of the United States Supreme Court. *Horelick* v. *New York*, 396 U.S. 873 (1969). Subsequently, this Court affirmed the District Court's order of remand. *People of the State of New York* v. *Horelick*, 424 F. 2d 697 (2d Cir.), *cert. den. sub nom. Horelick* v. *New York*, 398 U.S. 939, *reh. den.* 400 U.S. 883 (1970).

Petitioner and his co-defendant also commenced a civil rights action in the District Court seeking the convening of a three-judge court; an injunction to prevent their prosecution and harassment; a declaratory judgment as to the unconstitutionality of N.Y. Penal Law §§ 140.10 and 35.27 and N.Y.C. Crim. Ct. Act. § 40; and damages of $500,000. Petitioner and his co-defendant alleged various violations of their civil rights as well as the unconstitutionality of the above-mentioned statutes. Named dedendants in that suit were the New York City Police Commissioner, the New York County District Attorney, and two individuals who were employed at Washington Irving High School. The defendants moved to dismiss the complaint, as did the Attorney General of the State of New York, who was permitted to intervene in defense of the State statutes. On December 8, 1969 the District

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* Ms. Adickes was tried with petitioner and convicted under § 205.30 of the N.Y. Penal Law. Her conviction was reversed on appeal. *People* v. *Adickes*, 30 N Y 2d 453 (1972) (44-48a) (all numbers in parentheses followed by the letter "a" refer to the Appendix).

Court (RYAN, J.) denied the plaintiff's motion for a three-judge court and for an injunction and granted the defendants' motion to dismiss.

On January 7, 1971, after the state trial, this Court affirmed the dismissal of the civil rights case, *Adickes* v. *Leary*, 436 F. 2d 540 (2d Cir.), *cert. den. sub nom. Adickes* v. *Murphy*, 404 U.S. 862 (1971) (49-53a). Although petitioner had apparently not pressed the claim that the application of the trespass statute as to him was unconstitutional, this Court found that the arrests were not illegal since petitioner had no authority to force his way into the school.

The Trial

October 17, 1968 arrest

Petitioner's arrest stemmed from incidents which occurred during the 1968 teachers' strike in the New York City School System.* Petitioner, who was not in sympathy with the strikers, was employed as a teacher at Washington Irving High School at the time of the strike. When petitioner arrived at the school on the morning of October 17, 1968 there were numerous students, teachers and parents congregated there (T. 132, 220, 344, 358, 366)* as well as a busload of police (T. 355, 365). The school was closed (T. 91), pursuant to the orders of the school's principal (T. 153-54). When the school is closed the custodial engineer is in charge.**

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* The strike was a fairly lengthy one and engendered a great deal of hostility and bitterness between striking and non-striking members of the negotiating unit. See Grittell, *Confrontation at Ocean-Hill Brownsville* (1969); Mayer, *The Teacher's Strike, New York, 1968* (1969).

* All numbers in parentheses preceded by the letter "T" refer to the trial transcript, included as an exhibit in the Record on Appeal in this case, as it is paginated at the bottom of each page.

** For the sake of simplicity both the custodial engineer and his assistant will be referred to as the custodian.

Petitioner testified that he had heard on the radio and read in the newspaper that the schools were open (T. 351-52).*** When he arrived at the school, some teachers rattled at the doors of the school and were refused entrance by the custodian. One of the teachers, Edward Williams, proceeded to the office of the District Office, where he obtained a letter signed by Jack Landman, a superintendent, designating him teacher-in-charge. The letter said nothing about entry into the school, peacefully or by any other means, or about delegation of authority (30a; T. 245-46). The letter was shown to the custodian, who called Mr. Landman's office. Unable to get an answer there, he again refused the teachers entry because he was unable to verify the signature on the letter. Mr. Williams returned to the District Office and was told that Mr. Landman would call the school to verify the signature. Apparently no one waited for this call before taking further action.

As the teachers were looking for a way to get into the school, petitioner heard some teacher say that if anyone should break in it should be us (T. 359). Petitioner learned that a student had broken in through a basement window that morning and been put out. Despite his knowledge that the custodian was nailing all the windows shut, he followed the student to the side of the school, jumped a fence, and entered the school through a basement window (T. 360-61). Petitioner went to the first floor, struggled and fled from a custodian who tried to stop him, and tried to open a door for the people waiting outside (T. 361-62). This was the prearranged plan (T. 225, 291). He was arrested by a police officer, brought to the front lobby and then to a waiting car, and charged with criminal trespass and resisting arrest.

*** Petitioner was apparently referring to the October 16, 1968 statement of John Doar, President of the Board of Education (32a).

Petitioner testified that he did not see the Landman letter designating Mr. Williams teacher in charge until after he was arrested (T. 354, 376) but that he knew Mr. Williams was so designated (T. 377). He did not ask Mr. Williams any questions concerning his (petitioner's) right to enter the building (T. 377).

October 20, 1968 arrest

On Saturday evening, October 19, 1968 at 10:00 petitioner and a group of people again entered the school. The school was open that evening for a concert. Petitioner announced to the custodian that they intended to stay over in the school until Monday in order to keep the school open (T. 368). Soon thereafter approximately forty policemen arrived (T. 325, 368). Petitioner and his group were told to leave by the custodian and the police (T. 180, 368). Petitioner left, spoke to a lawyer outside, and then reentered the building. Petitioner was repeatedly asked to leave by the custodian and the police, and responded by posing questions to them (T. 181, 369-70). Petitioner was arrested for criminal trespass at a few minutes after midnight on October 20, 1968.

State Court Proceedings

Petitioner's conviction was affirmed without opinion by the Appellate Term, First Department on November 5, 1971. The Court of Appeals affirmed in a 4-3 decision. *People* v. *Horelick,* 30 N Y 2d 453 (1972) (36-43a). Petitioner moved for reargument, alleging that the Court of Appeals had subjected him to *ex post facto* judicial legislation in affirming the convictions. The motion was denied without opinion on September 28, 1972. The United States Supreme Court denied certiorari. *Horelick* v. *New York,* 410 U.S. 943 (1973).

District Court Proceedings

Petitioner then commenced a habeas corpus proceeding in the District Court. He alleged that in affirming his

conviction, the New York Court of Appeals had altered the nature of the crime of trespass, by incorporating forcible entry and detainer, so as to convict him under an *ex post facto* law; that, as applied to him, the trespass statute was vague and overbroad; that his arrests were a form of governmental entrapment since he believed he was authorized to behave as he did; and that his resisting arrest conviction was invalid as affirmed by the Court of Appeals and because he had a right to resist an unlawful arrest.

The District Court summarized petitioner's argument as to the trespass convictions as follows: that the proof adduced at trial did not support a conviction for trespass or forcible entry and detainer and that, in any event, petitioner could not be convicted of forcible entry and detainer or a combination of the two since its incorporation into the trespass law constituted *ex post facto* judicial legislation.

District Court Opinion

The District Court first concluded that the evidence adduced at trial did not support a conviction for trespass since petitioner had a colorable claim of privilege to enter, which is a defense to the criminal trespass under the law of New York.* Conducting a *de novo* review of the trial evidence, with particular reference to the October 16 Doar statement, the Court made a finding that there was insufficient evidence to support the trial court's conclusion that "petitioner was not in the position to assert that his entry was under a color of legal right" (T. 559).

Relying on its assumption that the Court of Appeals opinion found petitioner guilty of forcible entry and detainer, not trespass, in order to sustain the October 17 trespass conviction, the District Court examined New York

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* This was also the position of the dissent in the Court of Appeals.

law on forcible entry and detainer. Once again reviewing the evidence adduced at trial, the Court found that the requisite force necessary for a forcible entry and detainer conviction had not been established.

This conclusion, however, was unnecessary to petitioner's success in the proceeding, for the District Court went on to find that the Court of Appeals' incorporation of forcible entry and detainer into the law of trespass constituted *ex post facto* judicial legislation. The Court found that this unforeseeable judicial enlargement of the trespass statute, applied retroactively, deprived petitioner of notice of the crime with which he was charged and of an opportunity to defend himself against the charge.

Unfortunately, the District Court did not separately discuss the October 20th trespass conviction at all. Since there was no force or self-help involved during the October 20th incident, the Court apparently found the conviction void because of its finding that petitioner had a colorable claim of right to enter the school. Once again, this flew in the face of the trial court's finding (T. 560-61).

Petitioner's conviction for resisting arrest was upheld by the Court; it will not be discussed herein, as it is not an issue on this appeal. Because petitioner received one sentence for the October 17 trespass and resistance to arrest, the District Court could not allocate the portion of the sentence which applied to the resisting arrest conviction. Consequently, its order reversed the trespass convictions and granted the writ in full unless the State resentenced petitioner on the resisting arrest conviction.

Statute

Section 140.10 of the New York Penal Law states:

> § 140.10 Criminal trespass in the second degree
>
> A person is guilty of criminal trespass in the second

degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Criminal trespass in the second degree is a class B. misdemeanor.*

POINT I

Since habeas corpus does not lie to test the sufficiency of evidence supporting a state court conviction, the District Court erred in conducting a *de novo* review of the trial evidence and erroneously concluded that the evidence was insufficient.

A

In conducting a *de novo* review of the trial evidence to reach its conclusion that petitioner's trespass convictions were not supported by sufficient evidence, the District Court violated one of the cardinal principles of federal review in habeas corpus proceedings. This Court has long held that a claim that a conviction was not supported by sufficient evidence "is essentially a question of state law and does not rise to federal constitutional dimensions," e.g. *United States ex rel. Terry* v. *Henderson,* 462 F. 2d 1125, 1131 (2d Cir., 1972); *United States ex rel. Griffin* v. *Martin,* 409 F. 2d 1300, 1302 (2d Cir., 1969); *United States ex rel. Jenkins* v. *Follette,* 257 F. Supp. 533, 534 (S.D.N.Y., 1965), absent a record so totally devoid of evidentiary support that a due process issue is raised. *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Thompson* v. *Louisiana,* 362 U.S. 199, 206 (1960); *United States ex rel. Terry* v. *Henderson,*

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* L. 1969 c. 34 (1969) reduced the crime one degree to third degree trespass.

supra; United States ex rel. Jenkins v. *Follette, supra.** "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but, rather, to review for violation of federal constitutional standards." *Milton* v. *Wainwright,* 407 U.S. 371, 377 (1972).

B

Moreover, not only did the District Court exceed its authority in conducting such a *de novo* review of the trial evidence, but also it reached the unwarranted conclusion that "the evidence overwhelmingly established that Horelick could and did reasonably believe that he was authorized to enter the school."* The District Court relied upon a principle of New York law which makes a colorable claim of privilege or license a defense to a charge of trespass. *People* v. *Stevens,* 109 N.Y. 159 (1968); *People* v. *Barton,* 18 A D 2d 612 (1st Dept., 1968); Denzer & McQuillan, *Practice Commentary,* McKinney's, vol. 39 at 347. See *People* v. *Licata,* 28 N Y 2d 113, 117 (1971); *Matter of Ray D.R.,* 70 Misc. 2d 184 (Fam. Ct. Kings Co., 1972). However, the Court cited only the October 16 Doar statement, which invited the teachers to come to work and directed that the District Superintendent keep the schools open (32a), to support its finding that petitioner had such a colorable claim.

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* This rule exists, *inter alia,* to maintain the delicate balance of the federal-state judicial relationship, which is subject to considerable stress whenever a federal court is called upon to review a state conviction. See *Darr* v. *Burford,* 339 U.S. 200, 204 (1950); *United States ex rel. Cleveland* v. *Casscles,* 479 F. 2d 15, 19 (2d Cir., 1973). Absent such a rule the federal courts would be assuming the role of the state appellate courts each time such a claim was made; such a role is not envisioned within the scheme of federal habeas corpus review. Cf: *Schaefer* v. *Leone,* 443 F. 2d 182, 185 (2d Cir.), *cert. den.* 404 U.S. 939 (1971).

* The October 17 conviction was invalidated also on a second ground, discussed in Point II, *infra.*

There was ample evidence, however, to support the trial court's conclusion that petitioner could not claim a colorable right to enter or remain in the school on either occasion. In the first place, the Doar statement said nothing at all about the right of an individual teacher to enter the school or to open the school for a crowd of teachers and students waiting outside. Moreover, no reasonable person could infer from the statement a claim of right to enter a basement window, surreptitiously or forcefully, especially when he knew that the school was physically closed.* Even Mr. Doar testified that the statement was meant only to tell the school employees that the school "would be open" (T. 426). There is no testimony by Mr. Doar that this statement authorized an individual to open the school himself, peacefully or by other means.**

Petitioner also sought to rely on the Landman letter which designated Mr. Williams teacher in charge. He admitted, however, that he did not read this letter until after his arrest (T. 354, 376) and that he never even questioned Mr. Williams about his (petitioner's) right to enter the school. In any event, that letter (30a) did nothing more than designate Mr. Williams teacher in charge. It said nothing about entry into the school, peacefully or by

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* Lack of license can be proved circumstantially, as well as by direct testimony. Thus, when a defendant was apprehended in a building closed for the night, with steel shutters over the windows, and a jimmied door, lack of license to enter could be inferred. "No one can say the owner gave the respondent a license or privilege to enter under these conditions and certainly not to enter it by jimmying a side door." *Matter of Ray D.R., supra* at 186.

** Indeed, the Board's contrary intent is manifest in the Board's directive regarding the designation of teachers in charge, which was one of petitioner's exhibits at trial (31a). That directive stated the procedures to be followed if the custodian refused to open the school. The procedure was to call various offices, not to attempt self-entry.

other means, and in no way indicated that Mr. Williams could delegate his authority to anyone else (T. 214-15, 308-10).

As to the October 20 incident, petitioner presumably relied again on the Doar statement. This reliance is not only misplaced but incredible; nothing in that statement can possibly be read as permisison for a teacher to enter the school on a Saturday night and stay over until Monday. Indeed, petitioner must have recognized this since he left after the custodian heard this announcement and told him to leave. When petitioner reentered the building,* he was repeatedly directed to leave by the custodian and police and refused to do so. He cites no authority for his right to remain in the school after such orders.

In short, there was ample evidence to negate petitioner's claim that he had a colorable claim to enter or remain in the school on either occasion. The trial court was well aware of the defense theory. But that court observed the demeanor of the witnesses and reviewed the documentary evidence; it was for the trial court to weigh the conflicting inferences and credulities. That court did so; in making its findings, the Court reviewed the evidence regarding the October 17 incident and concluded that petitioner "was not in the position to assert that his entry was under a color of right" (T. 559). This conclusion obviously applied to the October 20 incident also (T. 560-61).

Moreover, this is exactly the finding made by this Court when it affirmed the dismissal of petitioner's civil rights complaint. Referring to the Landman letter designating Mr. Williams teacher in charge, this Court found:

> "Exhibit B annexed to the complaint makes it quite clear that Williams, the designated teacher in charge,

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* Petitioner testified that he reentered to have the custodian arrested (T. 369). The policeman who testified regarding the October 20 incident did not recall such a request (T. 187-89).

was not authorized to try to force his way in, and indeed there was no authorization to delegate his authority to enter, even peacefully. The trespass arrests were therefore not illegal . . ." (53a)

Having litigated this issue once before in this Court, surely petitioner should be bound by the Court's finding.

Consequently, not only did the District Court exceed its authority in conducting a *de novo* review of the trial evidence, but also it drew an unwarranted conclusion about the evidence, which conclusion is not supported by the trial record.

POINT II

The New York Court of Appeals did not sustain petitioner's October 17 trespass conviction on a finding that he was guilty of forcible entry and detainer and the District Court erred in reversing the conviction on this mistaken reading of New York law.

As an alternative basis for overturning petitioner's October 17 trespass conviction, the District Court found that the New York Court of Appeals had incorporated the crime of forcible entry and detainer into the law of trespass in order to support the conviction, subjecting petitioner to *ex post facto* judicial legislation. This holding rests on a mistaken reading of the Court of Appeals opinion (36-43a).

The Court of Appeals did not affirm petitioner's October 17 trespass conviction because it found him guilty of forcible entry and detainer. What the Court of Appeals did find was that, regardless of any claim of right to be in the school, petitioner did not have a claim of license or privilege to open the school by surreptitious entry or force. The Court said:

"The issue turns on whether or not the affected teach-

> ers had 'license' or 'privilege' to open the school by surreptitious entry and force, and not whether they had a right or duty to be in the school." (39a)

In other words, the defense of license or privilege to be in or to enter the school was not the issue, since petitioner clearly did not have the defense of license or privilege to enter the school as he did. The Court's reference to civil and criminal statutes relating to forcible entry and detainer, as well as to other sources, was used only to support its view that self-help or force is not favored by the law.*

The Court's decision did not constitute *ex post facto* judicial construction but was merely a reasonable application of the New York trespass law, consistent with prior New York law as well as common sense. There is nothing in the trespass law of New York which could have led petitioner to believe that license to be in or even enter into a building is an implied license to enter surreptitiously through a basement window and open the building for others, especially when he possessed knowledge that the building was physically closed. It is simply not a claim that a "person of ordinary intelligence" could hold. *People* v. *Stevens, supra,* at 164. Under petitioner's defense theory, if A said to X "Come to my house tonight," and X does so and is denied entry by A's wife, X could then come in through a basement window to gain entry, claiming license or privilege. Clearly the latter type of license does not follow from the former. Moreover, defendants who seek the defense of license to enter by force have been required to show strong evidence of such license, such as ownership. E.g. *People* v. *Barton, supra.*

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* Forcible entry and detainer was a crime under the former Penal Law § 2034. It is still a ground for a civil suit by the wronged party for damages. Real Prop. Actions and Proc. § 853. Forcible entry and detainer may of course be a trespass also.

The holding that license to do one thing does not imply license to do another is supported also in the civil trespass law of New York. Just as entry onto the premises without license is a trespass, "upon the same principle, entry and occupation beyond the limit fixed by the license would equally be a trespass, for the licensee must bring himself within the terms of permission to justify under it." *Capel* v. *Lyons,* 3 Misc. Rep. 73, 75 (Com. Pl. N.Y. 1893); *Jones* v. *Mayer,* 16 Abb. N.C. 84, 86-87n. (City Ct. 1883). Trespass has been defined as "the interference with a person's right to possession of real property either by an unlawful act or by a lawful act performed in an unlawful manner. *Annutto* v. *Town of Herkimer,* 56 Misc 2d 186 (Sup. Ct. Oneida Co.), *aff'd. in part, rev. in part on other grounds,* 31 A D 2d 733 (4th Dept. 1968), *app. dism.* 24 N Y 2d 820 (1969).

Similarly, when a particular entry, authority, or license is conferred by the law, an excess of the authority destroys the privilege and renders the act done in excess a *trespass ab initio.* Thus, when a statute gives a utility company the right of entry for a particular purpose, a forceful entry renders the conduct a trespass, e.g. *Reed* v. *New York & R. Gas Co.,* 93 A. D. 453 (2d Dept. 1964), *Velardi* v. *Consolidated Edison Co.,* 63 Misc 2d 623 (Sup. Ct. N.Y. Co. 1970), as does entry for a deceitful purpose. *Olin* v. *United Electric Light & Power Co.,* 82 Misc. Rep. 427 (A.T. 1st Dept. 1913).

The view is likewise supported by other authorities. The Restatement of Torts (Second) states that consent to enter which is restricted as to a particular purpose, or time, or portion of the property confers no privilege beyond that given (§ 168-170). Similarly, one who exercises privilege to enter land in an unreasonable manner is subject to liability under the Restatement (§ 214, Comment at 407). License justifies only acts which are within a "fair and reasonable" interpretation of its terms, 52 Am. Jur., Trespass § 39 at 867; 33 Am. Jur., License § 95, and

when the license is exceeded, the acts exceeding its restrictions may constitute trespass. 61 N.Y. Jur., Trespass § 14.

The New York Court of Appeals holding that the defense of license or privilege cannot be invoked to justify conduct beyond that authorized by the license is nothing more than a reasonable interpretation of New York law.* Cf. *Williams* v. *United States*, 179 F. 2d 644, 647 (5th Cir. 1970). Petitioner was not subjected to *ex post facto* judicial legislation by the Court of Appeals. He has no claim that "a statute, precise on its face has been unforeseeably and retroactively expanded by judicial construction," *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964), nor that he was punished for conduct that was not criminal at the time he committed it. *Rabe* v. *Washington*, 405 U.S. 313 (1972), *Bouie* v. *City of Columbia, supra*. The statute provided "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harris*, 347 U.S. 612, 617 (1954) and no element of common sense or New York law led him to believe that he was somehow licensed to behave as he did.

Absent a violation of a federal constitutional right, the federal courts are bound by a state court's interpretation of state law. E.g. *O'Brien* v. *Skinner*, —— U.S. ——, 94 S.Ct. 740, 744 (1974); *Garner* v. *Louisiana, supra; Albertson* v. *Millard*, 345 U.S. 242, 244 (1953); *Stori* v. *Massachusetts*, 183 U.S. 138, 142 (1901). Cf. *Brady* v. *Maryland*, 373 U.S. 83, 90 (1963). But for such a rule, every disagreement by a federal judge with a state

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* Cf. *People* v. *Epton*, 19 N.Y.2d 496 (1967), in which the Court of Appeals reinterpreted the criminal anarchy statutes to meet modern constitutional standards. *Id.* at 504-506. Epton's appeal to the Supreme Court was dismissed for want of a substantial federal question. *Epton* v. *New York, cert. den. and app. dism.*, 390 U.S. 29, *reh. den.* 390 U.S. 976 (1968), *reh. den.* 398 U.S. 944 (1970). Epton was not allowed to reraise this issue in his habeas corpus proceeding. *United States ex rel. Epton* v. *Nenna*, 446 F.2d 363 (2d Cir. 1971), *affg.* 318 F. Supp. 899 (S.D.N.Y. 1970), *cert. den.* 401 U.S. 948 (1971).

court's interpretation of its law would be turned into a federal constitutional question, imposing "an additional burden on our already over-burdened federal courts and pose[ing] an unnecessary and undesirable threat of greatly increased federal intervention in cases involving . . . the construction of State law." *Schaefer* v. *Leone*, *supra*, at 185.*

Since the New York Court of Appeals interpreted its law on the defense of license in a way which violated no federal constitutional right, its finding is binding on the federal courts.

CONCLUSION

The decision of the District Court should be reversed.

Dated: New York, New York, April 18, 1974.

Respectfully submitted,

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First Assistant Attorney General

MARGERY EVANS REIFLER
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of Counsel

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* Under this principle, the federal courts have refused to review state court interpretations of their own law in various areas. E.g. *Schaefer* v. *Louisiana*, *supra* (elements of the crime of pool selling); *McMichaels* v. *Hancock*, 428 F. 2d 1222 (1st Cir. 1970) (effective date of repealed penal statute); *United States ex rel. Almeida* v. *Rundle*, 383 F. 2d 421 (3rd Cir. 1967), *cert. den.* 393 U.S. 863 (1968) (elements of felony murder); *Silva* v. *Cox*, 351 F. 2d 61 (10th Cir. 1965), *cert. den.* 383 U.S. 919 (1966) (waiver of right to a preliminary hearing in a felony case).

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Eleanor K. Hefferin , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellant herein. On the 18th day of April , 1974 , she served 2 copies of the annexed upon the following named person :

PAUL CHEVIGNY, ESQ.
Attorney for Petitioner-Appellee
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Eleanor K. Hefferin

Sworn to before me this
18th day of April , 1974

Margery Evans Reeves

Deputy Assistant Attorney General
of the State of New York